# BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, DC 20554

	)	
In the Matter of	)	
	)	WC Docket No. 07-245
Implementation of Section 224 of the	)	
Act;	)	
	)	GN Docket No. 09-51
A National Broadband Plan for Our	)	
Future	)	
	)	
	_)	

To: The Commission

## **COMMENTS OF IDAHO POWER COMPANY**

By: Richard J. Garlish

Senior Counsel

Brent Van Patten Joint Use Leader

Idaho Power Company 1221 West Idaho Street

P.O. Box 70

Boise, Idaho 83707

Telephone: (208) 388-2670

# BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, DC 20554

	)	
In the Matter of	)	
	)	WC Docket No. 07-245
Implementation of Section 224 of the	)	
Act;	)	
	)	GN Docket No. 09-51
A National Broadband Plan for Our	)	
Future	)	
	)	
	)	

To: The Commission

#### **COMMENTS OF IDAHO POWER COMPANY**

Pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules, Idaho Power Company ("Idaho Power") hereby submits these Comments to address the questions and issues raised in the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceedings.<sup>1</sup>

#### I. INTRODUCTION

Idaho Power is an investor-owned public utility with its principal place of business located in Boise, Idaho. Idaho Power's service territory covers approximately 24,000 square miles in southern Idaho and eastern Oregon, with an estimated population of one million. Idaho Power is subject to the jurisdiction of the Idaho Public Utilities

COMMENTS OF IDAHO POWER COMPANY - 1

<sup>&</sup>lt;sup>1</sup> Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 21, 2010) ("Pole Attachment FNPRM"). The FNPRM was published in the Federal Register on July 15, 2010. 75 Fed. Reg. 41338.

Commission ("IPUC"), the Oregon Public Utilities Commission ("OPUC"), and the Federal Energy Regulatory Commission ("FERC"). Idaho Power has a significant number of third-party attachments on its electric utility facilities and anticipates more requests for attachments in the future. Idaho Power has previously submitted comments in proceedings before the Commission relating to pole attachments. Accordingly, Idaho Power is interested in the FCC's proposals to revise its existing pole attachment policies.

Idaho Power supports the comments submitted by the Edison Electric Institute ("EEI") in this proceeding. Idaho Power's comments are not intended to be a comprehensive statement on any issue. Rather, Idaho Power's comments are intended to support EEI's comments and to provide the Commission with utility perspective on the proposed revisions to existing pole attachment policies.

#### II. <u>DISCUSSION</u>

## A. <u>Access to Pole Attachments</u>.

# 1. Make Ready Timeline.

The Commission has previously held that general rules are preferred over detailed requirements, such as mandatory deadlines.<sup>2</sup> The Commission re-affirmed this holding within the context of the FNPRM finding that "no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment."

<sup>&</sup>lt;sup>2</sup> Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Report and Order, 11 FCC Red 15499, 16068 at ¶ 1143 (1996) (Local Competition Order).

<sup>&</sup>lt;sup>3</sup> Pole Attachment FNPRM at ¶ 24.

The Commission's previous holdings notwithstanding, the FNPRM proposes to establish a five-stage timeline, including significant milestones within each stage, to govern the pole attachment process for wired attachments.<sup>4</sup> Every pole attachment request is unique and the amount of engineering, design, and other similar activities associated with processing a request for attachment varies significantly. For example, engineering and construction for make-ready work on 5 poles can be done much more quickly that it can be done for 50 poles. Complications attributable to the volume of pole attachments requested notwithstanding, the complexity of make-ready work required for each pole has a significant impact on the amount of time required to engineer and perform make-ready construction. For example, poles with multiple electric circuits attached, junction poles, poles with electric equipment such as transformers, capacitors, reclosers, and pole risers are far more difficult to work with than in-line, tangent poles with no equipment attached. This is also true of poles with existing communication attachments and poles located in areas with difficult access or nearby obstacles, such as poles located in backyards that are surrounded by vegetation, fences, or buildings. Even terrain adds to the complexity. Poles located in rocky or hardpan soils make installation difficult and poles located on hills where long or inclined spans exist make engineering difficult. In all of these cases, added complexity and difficulty result in longer times required for engineering and construction. The range of complications described above can vary significantly within the context of one request as well as across a number of requests. For these reasons, the ability to work collaboratively with attachers to establish timelines and terms through bi-lateral negations is a key element of completing attachments in an efficient manner that balances the needs of both

<sup>&</sup>lt;sup>4</sup> Pole Attachment FNPRM at ¶ 31.

parties. The imposition of mandatory timelines is not likely to alleviate the complexity associated with processing pole attachment requests. Therefore, Idaho Power urges the Commission to continue its current pole attachment policies which allow utilities to negotiate in lieu of imposing additional regulatory burdens that are not likely to effectively promote timely pole attachment.

The Commission's timeline proposal is also likely to negatively affect key utility operations. Imposition of specific timelines and associated milestones will require utilities like Idaho Power to direct, or possibly acquire, additional resources to process pole attachment requests. It is difficult for Idaho Power to estimate the type, cost, and quantity of new resources that will be required to implement the Commission's proposed revisions to existing pole attachment policies. It is equally difficult for Idaho Power to quantify the impact associated with re-allocating existing resources to implement the Commission's proposed policy directives. However, it is clear that re-allocation of existing resources, or the procurement of additional resources, will reduce the resources otherwise available to the utility for providing core electric utility service

The Commission should consider its previous findings, along with the practical implications arising out of its application to utility operations, before moving forward with its timeline proposal. Idaho Power urges the Commission to adhere to its existing policies which allow the utilities the flexibility to effectively allocate resources, prioritize projects, and manage the variations inherent in pole attachment requests. Utilities require flexibility to maintain the appropriate balance between providing reliable electric utility services while timely processing attachment requests.

Idaho Power maintains that the most efficient means of ensuring timely processing of attachment requests is through a bilaterally negotiated contract. However, should the Commission elect to adopt its proposal, Idaho Power urges the Commission to incorporate the alternative approaches proposed by the EEI in this proceeding.

#### 2. **Outside Contractor Proposal.**

The FNPRM sets forth several significant proposals related to the use of outside contractors to expedite pole attachments. Specifically, the Commission proposes: (1) that attachers may use contractors (approved by the utility) to perform surveys and communications make-ready work when the utility has failed to timely perform, or as otherwise agreed by the utility;<sup>5</sup> (2) to require utilities to post or otherwise share with attachers a list of approved and certified contractors, including contractors that the utility itself uses: 6 (3) to require utilities to post the standards it uses to evaluate contractors for approval and certification and require the non-discriminatory application of those standards; and (4) to require utilities and prospective attachers to jointly direct and supervise contractors<sup>8</sup>

The Commission's proposals with regard to third-party contractors raise significant concerns for utilities such as Idaho Power. Idaho Power has a legal and regulatory obligation to provide safe, reliable, electric utility service to its customers. Idaho Power must also manage the property damage and personal injury risk that is

<sup>&</sup>lt;sup>5</sup> Pole Attachment FNPRM at ¶ 59.

<sup>&</sup>lt;sup>6</sup> Pole Attachment FNPRM at ¶ 62.

<sup>&</sup>lt;sup>7</sup> Id.

<sup>&</sup>lt;sup>8</sup> Pole Attachment FNPRM at ¶ 66.

associated with maintaining its electric facilities. Any failure to meet these standards is likely to result in financial or other harm to Idaho Power. Consequently, Idaho Power is incentivized to make sure attachments are done in a manner that is consistent with industry standards.

Idaho Power relies heavily on its ability to control third-party access and activities on its electric facilities to manage risk and to assure reliable service. The Commission's proposals would severely hinder a utility's ability to assert effective control over the work being undertaken on its facilities by third parties. The FNPRM suggests that any such concerns would be mitigated by providing utilities the authority to set standards and prequalify contractors. The proposed mitigation only introduces more uncertainty for utilities. First, there are a number of existing standards that must be met when work is performed on electric utility facilities, including, but not limited to, OSHA and NESC standards. Idaho Power does not set such standards but would likely be responsible for assuring compliance under the Commission's proposals. Significant resources would be required to assure compliance through activities such as training verification and site supervision. Second, the FNPRM also does not provide or consider any limitation of liability for utilities arising from the acts or omissions of third-party contractors who perform work on an electric utility's facilities. Third, the FNPRM also does not contemplate any course of action available to utilities against the third-party contractor for failure to perform the work contemplated in a manner consistent with the existing standard. In short, the Commission's proposal only introduces more uncertainty and potential liability for utilities.

Moreover, the Commission's proposals are structured in a manner that is likely to give rise to ongoing disputes that will ultimately adversely impact the deployment of broadband. The Commission's proposal contemplates that the third-party contractor will either work for the attacher, or in the alternative, will be jointly supervised by the utility and the attacher. Attachers are incentivized to complete make-ready work in a costeffective and timely manner. In contrast, utilities are incentivized to balance the attacher's needs against the obligation to provide safe and reliable service. It is not difficult to conceive of a circumstance where conflict would arise in a joint supervision or other similar context as a result of these varying interests. These disputes are likely to occur and will require significant resources to efficiently resolve. Delays arising from the dispute resolution process will hinder utility operation and delay the completion of contested attachments. It is also important to note that the need to provide attachers with access to third parties may vary from state to state. The Commission's third-party attacher proposal appears to be based on the concern that make-ready work is consistently not completed in a timely manner throughout the country. From Idaho Power's perspective, the Commission's concerns are misplaced. Since 2006, Idaho Power has processed an average of 220 pole attachment requests per year. The average request included or directly affected an average of 13 pole attachments. Straightforward requests are processed and make-ready work is completed within 45 days. Clearly, there are states that are able to complete attachments under the existing rules. The Commission should account for this fact in considering changes to its existing policies.

The Commission's proposals regarding third-party contractors introduce significant risks for utilities that far outweigh any benefits that might be realized by an attacher. Accordingly, the Commission should continue with its existing pole attachment policy. If the Commission rejects Idaho Power's position, it should consider and adopt the proposals set forth in the EEI's comments submitted in this docket.

# 3. Commission's Proposal to Incentivize Expedient Pole Access Is Unreasonable.

The FNPRM makes several additional proposals intended to incentivize prompt access to utility facilities for pole attachers. These incentives include, but are not limited to, uniform rate schedules, progress payments for make-ready work, attachment administration, and attachment techniques.<sup>9</sup> Idaho Power's comments to the significant proposals are set forth below.

#### B. Uniform Rate Schedule.

Idaho Power believes all payment terms should be negotiated and included in the terms of a pole attachment agreement. A uniform schedule of charges fails to fully appreciate the unique nature of each pole attachment request. As discussed previously, every attachment is different. Therefore, the costs for pole attachments are not uniform and are not easily predicted. In addition, natural market forces cause material and labor costs to frequently change. Moreover, in a uniform schedule of charges, structure costs are ultimately spread across a number of attachers. From the attacher's perspective, this results in a potential benefit in terms of cost because the actual cost of the attachment is spread across many parties. From the utility's perspective, such a structure is likely to result in a greater opportunity for under

-

<sup>&</sup>lt;sup>9</sup> Pole Attachment FNPRM at ¶¶ 70-73.

recovery of costs and cross subsidization of attachers by ratepayers. A uniform rate structure would also likely result in additional or more complicated ratemaking proceedings that may be contentious in some cases. At best, a uniform rate schedule would introduce uncertainty, add additional administrative costs, and potentially further hinder attachment on utility facilities.

In contrast, a negotiated contract prevents cross subsidization and ensures the cost causer is paying its actual costs. At Idaho Power, make-ready costs are calculated based on the requirements of each attachment request at the time the attachments are requested. This arrangement provides the attacher with a full accounting of the cost of the make ready and insulates Idaho Power's ratepayers. The current policy which allows a utility to assess actual costs directly to the attachers is far superior to the Commission's proposal to allow the establishment of a uniform rate schedule. The Commission should adhere to its existing policy and not require uniform rate schedules.

## C. <u>Progress Payments</u>.

Idaho Power does not support the Commission's progress payment proposal set forth in the FNPRM, which allows the attacher to withhold payment until the completion of work. The Commission's progress payment proposal would negatively impact utilities from both the financial and operational perspective.

From a financial perspective, allowing attachers to withhold payment would require the utility to finance the up-front cost of attachment without any security from the attacher. This approach places an inordinate burden on the utility's limited financial resources. In addition, delays in progress payments will undoubtedly have a negative impact on the working relationship between the utility and the attacher. The utility will

not be incented to rapidly process subsequent pole attachment requests. Ultimately, this degradation of the working relationship will delay pole access, not expedite it.

A progress payment approach would likely significantly impact utility operations. Pole attachment requests often require the relocation of existing facilities essential to the provision of utility service. Under a progress payment structure, relocation of facilities may become inefficient and the reliability of service could be harmed where attachers fail to tender timely payment. Again, this will result in pole access being delayed, not expedited.

The progress payment approach inappropriately forces utilities to give greater priority to attachment requests over ongoing utility operations to the detriment of utility customers. The Commission should not adopt a policy of progress payments without further consideration of the practical effect on utilities' financial and operational activities and the predictable, ultimate impacts on timely pole access.

# D. <u>Administrating Pole Attachments</u>.

The Commission seeks comment regarding a "managing utility's" responsibility to administer the pole make-ready process where there are existing attachers affected by a new attachment request. Decifically, the Commission proposes to require utilities to serve as a clearinghouse that would assess costs, issue invoices, collect payments, and make disbursements to attachers.

The Commission's proposal is not well grounded and entirely unreasonable.

Utilities are in the business of providing electric service to retail customers. The

Commission's proposal essentially requires the utility to assume the overhead and

\_

<sup>&</sup>lt;sup>10</sup> Pole Attachment FNPRM at ¶ 73.

<sup>&</sup>lt;sup>11</sup> *Id*.

associated costs of a third party. The Commission has entirely failed to consider the increased administrative and financial burden acting as an attachment clearinghouse would impose on utilities. Idaho Power expects that significant additional accounting, finance, and administrative processing would be required to maintain compliance. These activities would add substantial costs of approximately \$150,000 per year. If the utility is required to act as a bank and commit its resources, it should be appropriately compensated through a charge that reflects the actual costs as well as a rate of return.

The Commission's answer appears to be that attachers would be responsible for reimbursing the utility for the costs incurred. This is an incomplete and unsatisfying proposal. Under the proposal, the utility would be required to finance the costs up front and would not receive reimbursement until after the work was completed. As a practical matter, the utility's financial resources that would otherwise be available for ongoing utility operations would be dedicated to the attachments. This is fundamentally unreasonable. Moreover, the Commission's proposal assumes attachers will voluntarily reimburse the utility in a timely matter. It is more than likely that in some cases the utility will encounter additional cost and administrative burdens trying to collect funds from attachers. In such circumstances, the utility would essentially be paying out-ofpocket. The Commission's proposal contains no penalties or other consequences that accrue to the attachers for failing to reimburse the utility or other attachers. The Commission's clearinghouse proposal is inordinately one sided and entirely minimizes the potential effects on utility operations. The Commission should defer any action on this proposal. At a minimum, the Commission should include protections, such as

penalties, for delinquent attachers and a compensation structure that fairly compensates the utility.

## E. <u>Attachment Techniques</u>.

Finally, the Commission must not micromanage the ability of utilities to determine the types of attachment techniques they need to utilize. As stated previously, the attachment process is complicated and unique in nature. The Commission should not dictate to utilities the scope and application of attachment techniques such as bracketing and boxing. Any given attachment may require one or several approaches which may or may not conflict with how attachments have been completed in the past. There is no rule that can be drafted that is flexible enough to account for all the possible variations associated with an attachment request. Accordingly, the Commission should defer to the local utility to determine the best techniques for completing attachments.

In summary, Idaho Power urges the Commission to consider incentives for expediting in the context of a utility's core operations. There are very real operational and financial consequences on the utility's core operations arising from the incentives proposed by the Commission. For these reasons, it is important that any policy or rule revision adopted by the Commission provides electric utilities the flexibility to retain control of their relocation schedules, payment structures, and establishment of appropriate rate schedules. The appropriate way to maintain flexibility and maximize good working relationships and expedited access to utilities' poles is to recognize negotiated pole attachment agreements as governing documents for pole attachment rates, terms, and conditions.

# F. Commission Proposal for Improving Data Access.

Idaho Power fully supports the comments submitted by EEI regarding the Commission's proposal to acquire more information about utility infrastructure through various methods. However, Idaho Power must emphasize the importance of maintaining and retaining control of detailed information regarding critical facilities on its system. Utility information regarding core utility facilities and activities related to the operation, maintenance, and management of those facilities is very sensitive in nature. Accordingly, any policy adopted by the Commission should account for the sensitive nature of utilities' infrastructure information as well as the regulatory burdens utilities must satisfy with respect to such information.

# G. <u>Enforcement Process</u>.

# 1. Proposal for Revising Pole Attachment Dispute Resolution Procedures.

The Commission seeks comment in the FNPRM on whether it should enact rules governing both formal and informal dispute resolution processes. The Commission should continue to allow parties to develop their own informal and formal mechanisms for resolving disputes through bilateral negotiations. The process for resolving disputes should be provided for within the terms of the pole attachment agreement which governs the course of dealings between the parties. If the Commission elects to adopt rules providing for both informal and formal dispute resolution mechanisms, Idaho Power urges the Commission to allow flexibility for attachers and utilities to craft mutually acceptable dispute resolution provisions within the context of a pole attachment agreement.

-

<sup>&</sup>lt;sup>12</sup> Pole Attachment FNPRM at ¶¶ 78-83.

#### 2. Remedies.

Idaho Power concurs with EEI's legal analysis regarding the Commission's authority to adopt a compensatory damage scheme. The Commission is without legal authority to order compensatory damages by administrative rule. Legalities aside, the Commission's proposal is inordinately one sided as it fails to provide the utility with a cause of action or avenue to collect damages associated with the attacher's failure to meet its various obligations. Moreover, the Commission's FNPRM inappropriately assumes that any delay in attachment will ultimately be attributable to a failure by the utility. This is simply not the case. Any number of variables, including a failure to act by the attacher, could result in delay. Under the Commission's proposal, the utility would be liable for that delay and there is potentially no limitation on the liability that could be imputed to the utility. These factors are compounded by the Commission's desire to revise its policies to allow a claim without the filing of a complaint with the Commission, which undermines any limitation on liability arising from time. Overall, the approach employed by the Commission in its proposal undermines common notions of fairness and should be rejected.

If the Commission elects to move forward with its proposal, Idaho Power urges the Commission to include similar rights and liberal statute of limitations for any claims brought by utilities against attachers. While not ideal, inclusion of such a policy in its rules would provide the utilities with some insulation from liability and put it on equal footing with attachers.

#### 3. Unauthorized Attachments.

Idaho Power commends the Commission for acknowledging the existence and implications arising from unauthorized attachments. Idaho Power fully supports the Commission's proposal to allow significant penalties for unauthorized attachments. The Commission's proposal to adopt an approach to penalties similar to that employed in Oregon is a welcome acknowledgement of the significance of challenges utilities face in managing unauthorized attachments, including significant financial and opportunity costs. The formula utilized in Oregon is not likely to justly compensate the utility or serve as a deterrent to offending attachers. To the extent possible, penalty structures similar to those utilized by FERC for violations of mandatory reliability criteria would be a far more appropriate proxy for determining appropriate penalty ranges for unauthorized attachments. Penalties prescribed in Oregon rules are too small to deter For communication companies, the opportunity costs unauthorized attachments. associated with not providing service to a potential client far exceeds and outweighs Oregon's penalties for unauthorized attachments. While the penalties amount to a few hundred dollars per pole, not providing service to a potential client could result in tens or hundreds of thousands of dollars in lost revenues.

#### 4. Sign and Sue Rule.

The Commission seeks comments on modification of the existing "sign and sue rule." Specifically, the Commission proposes to modify its rules to require an attacher

COMMENTS OF IDAHO POWER COMPANY - 15

<sup>&</sup>lt;sup>13</sup> Pole Attachment FNPRM at ¶ 99.

to provide a pole owner with notice during contract negotiations of the terms it considers unreasonable or discriminatory.<sup>14</sup>

Idaho Power maintains that the sign and sue rule should be eliminated in its entirety. The utility is often required to enter into attachment agreements knowing that the Commission's complaint process may be misused to force the utility to accept provisions that it would not have agreed to in the context of a negotiation. The sign and sue rule allows attachers a method to undermine the contractual relationship between the parties at any time.

The Commission's proposed modifications do little to remedy the current situation. Often, utilities like Idaho Power are aware in the context of negotiation which provisions are potential candidates for attachers to employ the "sign and sue" strategy. Having formal written notice at the time of negotiation provides only verification of anticipated difficulty and does little to address underlying concerns. The proposal does little to address the legitimate concerns of utilities that there is no real ability to effectively strike and be confident in the deals that have been reached with attachers. Idaho Power urges the Commission to repeal the sign and sue rule, or at a minimum, to leave the current rule in effect without modification. The changes proposed by the Commission are not likely to remedy or improve the negotiation process and could increase the potential for adverse impacts for all parties.

#### H. <u>Pole Rental Rates</u>.

The Commission proposes to reinterpret Section 224(e) telecom rate formula so as to yield pole rental rates that reduce disputes and investment disincentives arising

\_

<sup>&</sup>lt;sup>14</sup> *Id*.

from the disparate rates yielded by the Commission's rules.<sup>15</sup> The Commission seeks comment on several approaches to reinterpreting Section 224(e), including its own proposal to interpret the statute in a manner that would allow for the establishment of a range of permissible rates derived from the current application of the telecom rate formula to an alternative application of the telecom rate formula based on cost causation principles at the lower end.<sup>16</sup> Under this approach, the Commission would select a particular rate within that range as the appropriate telecom rate.<sup>17</sup>

The Commission's proposal fails to recognize the defects associated with the current telecom rate calculation, which adversely impacts utility ratepayers. Idaho Power has commented extensively on this issue in previous Commission proceedings. It Idaho Power, consistent with its previously filed comments, maintains the Commission should adopt a single rate approach for all communication cable attachments in the communication space on distribution poles. The single rate should include taxes, capital cost, and compensate utilities for the space actually utilized by attachers, including the communication worker safety zone. Additionally, the rate should reflect the costs utilities incur building additional space into infrastructure facilities in anticipation of attachments and operation and maintenance costs incurred as a result of the added coordination and complexity of construction on jointly used poles. Utilities often install taller poles than necessary in anticipation of pole attachment requests.

\_

 $<sup>^{15}</sup>$  Pole Attachment FNPRM at  $\P$  122.

<sup>&</sup>lt;sup>16</sup> Pole Attachment FNPRM at ¶ 128.

<sup>&</sup>lt;sup>17</sup> *Id*.

<sup>&</sup>lt;sup>18</sup> In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Idaho Power Company, March 7, 2008.

In addition to comments by Idaho Power in previous Commission proceedings, the Commission must carefully consider the inadequacy of the current and proposed rate formulas to fully compensate the utility for capital, operation, and maintenance costs incurred to accommodate communication attachments. For example, under the current telecommunication rate formula, a utility that invests an additional \$100,000 for taller poles in anticipation of pole attachment requests can only recover \$0.01 per attachment. For Idaho Power, this results in only \$1,100 or approximately 1 percent of its investment being recovered. This means 99 percent of the utility's additional investment to accommodate communication attachments is left for ratepayers to cover through cross subsidies. The rate of recovery is even worse for the cable TV rate formula. To assume that these rate formulas adequately capture and compensate utilities for their additional costs to accommodate communication attachments is incorrect and unrealistic.

#### III. CONCLUSION

Idaho Power respectfully requests that the Commission consider these Comments and adopt rules consistent with them.

DATED this 16<sup>th</sup> day of August 2010.

Respectfully submitted

Richard J. Garlish

Idaho Power Company

P.O. Box 70

1221 West Idaho Street

Boise, ID 83707

Telephone: (208) 388-2670